

***United States Court of Appeals  
for the Second Circuit***



**RESPONDENT'S  
BRIEF**



ORIGINAL

76-4228

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IN THE  
**United States Court of Appeals**  
For the Second Circuit

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RAY MARSHALL, Secretary of Labor,  
*Petitioner,*

*v.*

NORTHEAST MARINE TERMINAL COMPANY

and

OCCUPATIONAL SAFETY AND  
HEALTH REVIEW COMMISSION,  
*Respondents.*

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On Petition by Secretary of Labor  
to Review an Order of the  
Occupational Safety and Health Review Commission

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**BRIEF FOR RESPONDENT**  
**NORTHEAST MARINE TERMINAL COMPANY**

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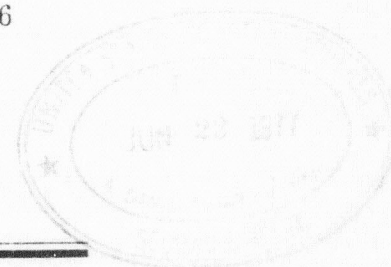


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OCCUPATIONAL SAFETY AND HEALTH  
REVIEW COMMISSION

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BRIEF FOR RESPONDENT  
NORTHEAST MARINE TERMINAL COMPANY

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I. ISSUE PRESENTED

Did the review Commission<sup>1</sup> act in an arbitrary  
or capricious manner, abuse its discretion or otherwise act

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<sup>1</sup>In this Brief the following terms are used: The Occupational Safety and Health Act of 1970 29 USC 651 et seq., is called "OSHA"; the Occupational Safety and Health Review Commission is called the "Review Commission"; the Secretary of Labor is called "Secretary"; Northeast Marine Terminal Company is called "Northeast Marine Terminal"; Northeast Stevedoring Company, Inc. is called "Northeast Stevedoring"; the Administrative Law Judge is called "ALJ"; the Joint Appendix filed herein is called "A" followed by reference to applicable pages, thus a reference to page 43 of the Joint Appendix would be "A 43" and the Secretary of Labor's Brief is called "S. Br.".

not in accordance with law by failing to find Northeast Marine Terminal had violated OSHA after the Secretary had failed to satisfy its burden of proving by credible, probative and non-hearsay evidence, that Northeast Marine Terminal employees were exposed actually or potentially to any OSHA violation or that Northeast Marine Terminal was responsible for the allegedly violative condition?

## II. STATEMENT OF THE CASE

### A. Preliminary Statement

OSHA and Regulations issued thereunder permit the Secretary to impose substantial fines on employers found to be responsible for exposing employees to certain non-serious hazards. The Secretary is permitted to issue citations charging these violations without significant procedural safeguards. But if an accused contests, the Secretary is required to prove the accused employer violated the OSHA Standards.

The Secretary is specifically given the burden of proving the necessary elements and is required to do so before an Administrative Law Judge in an adversary proceeding governed by the Federal Rules of Evidence. Employers are not required to prove that the hazard did not exist, that they did not create it or that their employees were not exposed.

In this case the Secretary asks the Court to impose a fine based solely on hearsay evidence of scant probative value supplied by a Compliance Officer who really lacked first hand knowledge of the facts he testified to. The Compliance Officer stretched the truth, purported to adduce facts which are beyond his ken and used conclusory statements to conceal the lack of basis for his statements. Rather than ask the Compliance Officer to follow the procedures spelled out in his own manual requiring him to ascertain the facts needed to prove his burden, the Secretary asks this Court to shift the burden of proving negatives to the employer. And the Secretary does so even though he possesses the ability to produce any fact needed to satisfy his burden through subpoenaed records or witnesses if the facts he needed were true.

Neither the Administrative Law Judge nor the Review Commission who heard the Secretary's case would accept this contention. Both held that the Secretary had not satisfied his burden of proof and dismissed the citations. The Secretary now appeals asking this Court to shift his burden to the employer.

B. Proceedings Below

On April 3rd and 4th, 1974, Compliance Officer, D. Martino, inspected the pier area at the Foot of 39th Street

in Brooklyn, which he called "Northeast" [A 5-7]. During the inspection, he professed to believe that Northeast Steve-dore was the sole employer on the job site [A 132-136]. Later he found out that Northeast Marine Terminal was also there [A 132-136]. Although he knew construction work was taking place at the site, he never ascertained whether other employers might also be present. [A 116].

The Compliance Officer completed his papers by April 10, 1974. [A 124] But it was not until May 14, 1974--over 30 days later--that the OSHA Area Director issued any citation against Northeast Marine Terminal [A 5-7]. The citation alleged seven non-serious violations of OSHA [A 5-7]. Contest was duly filed on May 28, 1974 [A 8]; the Secretary served his complaint on June 12, 1974 [A 9-16]; and Terminal answered June 26, 1974 [A 17-20].

A hearing was held on September 13, 1974, at which only one witness--the Compliance Officer--testified [A 28-143]. ALJ Chodes held that "the respondent did not violate the Standards set forth [in the Complaint as amended]" [A 155] and therefore vacated the citation because:

"[T]here is no probative evidence in the record showing that the violations established exposed employees of Respondent, Northeast Marine Terminal Co., to the hazards contemplated by the Standards."

[A 151-152].<sup>2</sup>

<sup>2</sup>At the hearing, Northeast Marine Terminal moved to vacate the citations on the ground that they were not issued "with reasonable promptness" as required by Section 9(a) of OSHA. The Administrative Judge denied the motion because of "the absence of evidence that the citation was issued more than three days after the complainant or his authorized agent had formed his belief that a violation had occurred. . ." [A 149].

The Secretary of Labor sought permission to appeal the ALJ's decision to the Review Commission as to only three violations and the OSHRC directed review on only two issues:

"(1) What effect if any should be given in this case to Brennan v. Gilles & Cotting, Inc., and OSAHRC, 504 F.2d 1224 (4th Cir. 1974), and Brennan v. OSAHRC and Underhill Construction Corp., 513 F.2d 1032 (2nd Cir. 1975)" [A 157]; and

"(2) Whether the Administrative Law Judge erred in finding that respondent's employees were not shown to have been exposed to the hazards contemplated by the Standards at 29 CFR §1910.178(m) (3), 29 CFR §1910.22(a) (1), and 29 CFR §1910.106(e) (2) (iv) (b)" [A 158].

The Secretary thus waived his opportunity to contest the vacation of the citation with respect to the other four items contained in the original citations [A 158 FN 3].

As to the first issue, the Review Commission gave no weight to either Giles & Cotting or Underhill saying:

"In this case, we find a failure of proof both as to whether respondent created or controlled the hazardous conditions shown to exist and whether respondent's own employees were exposed to the hazards." [A 157 FN 1].

As to the second issue, the Review Commission dismissed the three remaining citations because of the Secretary's failure to prove key elements under "any theory of liability", saying:

"[T]he inspector, upon observing noncompliant conditions, failed to inquire as to which

company was responsible for the conditions and which company employed the workers who were exposed to the hazards caused by these conditions."  
[A 158].

The second issue raised questions concerning three citations. In each case the Compliance Officer failed to identify whose employees were or might be exposed to the asserted violations or who controlled or created the hazardous conditions.

1. The §1910.178(m)(3) Citation

The first alleged violation arose out of an observation of two men riding a Hi-Lo (apparently a forklift) truck while there was only one seat on the truck. This, claimed the Secretary, was a violation of 29 CFR §1910.178(m)(3) which states:

"Unauthorized personnel shall not be permitted to ride on powered industrial trucks. A safe place to ride shall be provided where riding of trucks is authorized." [A 158].

The complaint charged that Northeast Marine Terminal "failed to prevent unauthorized personnel from riding on powered industrial trucks" [A 12 No. 7].

With respect to this violation the Compliance Officer first testified:

"There was a high-low moving across the area and two people were driving it and one partially hung over the machine and

the machine number 19, and during the closing conference Mr. Chiplock stated that since there was no ship working, these people were involved in a Terminal Operation, and this was a Terminal violation according to the discussions we were having." [A 56-57].<sup>3</sup>

Obviously, the Compliance Officer could not honestly testify that the people he saw were employees of Northeast Marine Terminal. Instead, his testimony, quoted above, seeks to conceal the absence of hard evidence with conclusory statements about the absence of ships. The Compliance Officer had testified the Northeast Stevedoring employees not only worked on ships, but were also responsible for storing and removing cargoes from sheds as well as loading and discharging trucks [A 53; 163]. The absence of a vessel did not mean that Northeast Stevedoring employees had nothing to do. They certainly could have been working cargo in the shed from which the Hi-Lo emerged.

On cross examination, Compliance Officer D. Martino admitted that the testimony was not an accurate description of what he knew or saw, but left out key elements which should have been brought to the ALJ's attention.

Thus, on cross examination, the Compliance Officer admitted:

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<sup>3</sup>In his attempt to justify his citation despite his lack of knowledge of key facts, the Compliance Officer often testified in a truncated and confusing manner. Rather than fill this brief with "sic's", we have instead carefully checked each quoted portion.

He did not know who owned Hi-Lo No. 19 [A 78];  
He could not say who was driving the truck [A 78];  
Chiplock (whose status as an employee of Terminal  
was never established) had not told him the driver was an  
employee of Northeast Marine Terminal [A 79];

He did not know whether the rider was employed  
by anybody on that day [A 79]; and

He did not even know who owned, operated or controlled  
the shed from which the Hi-Lo emerged [A 82-83].

## 2. The §1910.22(a)(1) Citation

The second citation in issue was a claim that Northeast  
Marine Terminal violated 29 CFR §1910.22(a)(1), which states  
that:

"All places of employment, passageways,  
store rooms and service rooms shall be  
kept clean and orderly and in a sanitary  
condition." [A 159].

The Secretary's complaint alleged "that the rear  
of the garage machine storage area and parts shelf area were  
littered with unused parts, rags and discarded equipment.  
Other areas littered with debris included the machine repair  
area bench and the rear of the maintenance building 111A" [A 11  
No. 2].

To prove this violation Compliance Officer D. Martino  
testified to seeing accumulations of materials, etc. in the:

"storeroom, garage and the rear of the garage area and building 111A. . ."  
[A 98-99].

When asked to "indicate the hazard [he] perceived" the Compliance Officer testified:

"Well, in one area, in the garage area, there was a stop log up against the wall area which made it hazardous in order to gain access to the material and parts wreck and in order to get to it, you have to climb over debris, pieces of metal wire and which were stored between the stop log area and shelf area and the mechanic sought of cleared the area at that time. As a result of that, the men could have been struck on his head and laid there and nobody would know it and would not be found there that day or the next day. It was an isolated area from the garage and a general work area."

"Q. What about some of the other areas?"

"A. In the one, in the maintenance area, there is an excess amount of material to what the room could hold and the material was stored at in the wall area, and in the center area and no aisles of passage were available. Rear of the area of the storeroom was being used for stores of metal parts and equipment and blocked the access from the telephone room down the ladder way and a means out. That area was also extremely hazardous." [A 99-100].

Once again, the Compliance Officer attempted to hide lack of direct evidence in conclusory allegations. And again on cross examination the Compliance Officer made the startling admission that "nobody is particularly work-

ing in the area" [A 100]. To justify the citation, he asserted that it was "the only means of escape for the telephone people located in the upper room . . . [of] the stores in the 111A building." [A 100]. But the Compliance Officer later admitted "I don't know how many people worked in the building" [A 101] and that as to the one<sup>4</sup> telephone person and the few mechanics he said he saw:

"I didn't ask them if they worked for the Terminal or for the Stevedore."  
[A 102].

No one ever testified whose one employee worked in the telephone room or whose room it was. Nor was there any testimony which would reveal who owned, operated or was responsible for the 111A shed or any other area in question.

### 3. The §1910.106(e)(2)(iv)(b) Citation

The third citation was for an alleged violation of 29 CFR §1910.106(e)(2)(iv)(b), which provides:

"Where flammable or combustible liquids are used or handled, except in closed containers, means shall be provided to dispose promptly and safely of leakage or spills." [A 159]

The Secretary's complaint asserted that "in the garage machine repair area . . . two buckets of flammable liquid were left standing after parts were cleaned." [A 11

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<sup>4</sup>On A 101, the "telephone people" had dwindled to one person.

No. 6]. As to this item, Mr. D. Martino testified:

A. "In the garage, the foreman we questioned about the method of cleaning machine parts and that they usually cleaned them with gasoline of which there were 2/3 full cans uncovered and there are about 30 pieces of machine parts spread out on the floor, dripping that had previously been cleaned, gasoline vapors, and there were 5 men working at the shop at the time and this particular area was within a caged area for security with a blocked means egress, and there was no method of disposing of the liquid for it was kept in covered cans or containers."

Q. "What was the hazard that you perceived as a result of this condition?"

A. "Any number of sources. The area was not posted for not smoking and people were smoking. The area was blocked for egress and the machines drove out of the area and could have effectively ignited the fumes. There was activity going on around the shop area where metal was struck on metal and a spark could have effectively ignited the area and an explosion could have ensued or a serious fire. Death and serious injury could occur. There was a discussion with Mr. Chiplock<sup>5</sup> about providing a high flash type of cleaner and I don't know if this was followed up, but we haven't gone back to check it."

Q. "Mr. D. Martino, did you propose a penalty for this particular item?"

<sup>5</sup>It appears that Mr. Chiplock is really Mr. Kiplock, but because the record constantly reflects the Compliance Officer's misnomer, we have made no attempt to correct the error in our brief preferring to be consistent with the Compliance Officer's testimony.

A. "There was a proposed penalty of \$230."

Q. "What factor lead you to that amount?"

A. "Probability of death and high probability of ignition and high probability of easy means of egress." [A 128-30] (emphasis added).

Here again, the Compliance Officer went so far to mask the lack of connection with Northeast Marine Terminal that he lapsed into a conclusory flight of imagined disaster which far outstripped the "uncovered cans" which was the limited allegation of the complaint. And again, he sought to use this hyperbole to mask the total absence of testimony that Northeast Marine Terminal was responsible or that its employees were involved. But even assuming he saw five men threatened with "easy means of egress" (and that this is an OSHA violation), the Compliance Officer never identified whose employees these men were or who was responsible for the condition or the area. There is no testimony to that effect anywhere.

4. "Laying Off" is no Admission of Liability

Other than the above the only testimony offered to connect Northeast Marine Terminal with these three citations was the Compliance Officer's assertion that:

"At the conclusion of the two day inspection, Mr. Chiplock and I held a closing conference and at that time we had a total of some

27 odd violations, and during the discussion, Mr. Chiplock suggested there were too many to lay off on the Stevedore and they should be separated between the Stevedore and the Terminal operation because the Stevedore did one function and the Terminal did another function. Where the Terminal made repairs and provided proper roadway and fire equipment and whatever was necessary to maintain a good place to work and the building and shed and equipment, whereas the Stevedore's primary function was to load and discharge vessels and store the cargo and remove it from the sheds and load and discharge trucks. We went down the list and separated some Terminal operational factors and citable conditions and put those for the Terminal side, and the others were for the Stevedore." [A 53-54].

\* \* \*

"Mr. Chiplock and I made the determination of which violations would be cited for the Terminal and which would be cited for the Stevedore and the term "laid off" is my term and it is only a question of separation." [A 55].

As to Chiplock's status, Compliance Officer D. Martino admitted that he determined Chiplock's status as the representative of Northeast Marine Terminal not on fact but on surmise.

The Compliance Officer admitted that during his inspection:

"I was concerned with just doing the inspection of the Northeast end to my knowledge Northeast has also been the Stevedore, because I was always involved with Stevedores and this is what I was doing. I thought I was doing an inspection of the Northeast Stevedore." [A 132].

He did not think any other corporation was involved until the closing conference when Chiplock provided him with two federal reporting numbers [A 133]. How then did this Compliance Officer know Mr. Chiplock, well, he explained:

"There was an inspection at the same complex in July of 1973 at which time Mr. Chiplock and a delegate of Shop Steward hailed a special inspection in regard to the hard hat violations and I advised them they will be cited unless the condition was abated immediately and the delegate of ILA came to the pier."

\* \* \*

Q. Did you make any determination as to Mr. Chiplock's job at that time?

MR. KIMBALL: "Objection. Immaterial."

JUDGE CHODES: "Did you make a determination or did you not?"

WITNESS: "Yes, I made a determination."

Q. "What was Mr. Chiplock's job?"

JUDGE CHODES: "Ask him what it was based on?"

Q. "What was the determination based on?"

A. "That Mr. Chiplock was the representative of the employer and that he was the Safety Director and the Coordinator for the complex."

Q. "How did you arrive at that determination? How did you learn that?"

A. "He told me he was a Safety Director."

JUDGE CHODES: "Mr. Chiplock told you that?"

WITNESS: "Yes sir."

Q. "Did he mention any corporate names at that time? What was the occasion?"

A. "We didn't go into any names."

Q. "When he said he was Safety Director, Safety Director of what?"

A. "He didn't say. You know, to go into the whole spiel of Northeast Stevedore. Just a Safety Director. I knew I was at Northeast Stevedore Complex."  
[A 134-135].

\* \* \*

A. "I said he was the Safety Director. I didn't say he was the Safety Director of any place."

Q. "You told the Government you knew. When he said he was the Safety Director, you put one and one together and you made him a Safety Director of Northeast Stevedore; is that right?"

A. "If you say so."

Aside from this inconclusive statement, the only other testimony as to Chiplock's status was:

Q. "So when you say mutual agreement, you meant you and so and so mutually agreed that certain of those violations would be charged against the Stevedoring Company and certain would be charged against the Terminal Company; is that right?"

A. "Not someone. Mr. Chiplock, the Safety Director who is acting as a Management Representative for both company's

closing conference and an abatement procedure."

Q. "Did he have a neon sign saying that he was acting as a representative of both companies?"

A. "That and the authority exercised during the procedure, yes sir."

Q. "He said he was doing this?"

A. "Yes sir."  
[A 113-114]

It is hard to believe that Mr. Chiplock wore a neon sign. But it is not surprising that D. Martino would so testify. He constantly offered conclusions as to things he neither knew nor remembered in order to cover up the lack of basis for his citation. Moreover, the Compliance Officer's testimony that the "authority exercised during the procedure" proved that status is belied by his earlier admission that he did not know Northeast Marine Terminal was even on the site until the closing conference [A 132-133].

There was no other testimony that Chiplock was safety director or an employee of Northeast Marine Terminal when the inspection took place in April, 1974. And there was no other testimony that Chiplock was acting for anyone but Northeast Stevedore when he supposedly suggested that the Compliance Officer "lay off" some of the citations on another employer.

### III

#### ARGUMENT

##### Point I

#### THE SECRETARY HAS FAILED TO MEET HIS BURDEN OF PROOF WITH RESPECT TO THE CITATIONS

The ruling appealed from is simply that the Secretary failed to meet the burden of proving that "any employee of respondent was actually exposed to the alleged hazardous conditions or had access thereto" or "that respondent created the non-compliant conditions or was responsible therefor" [A 160]. The standard of review of the decision is whether the Review Commission's decision is either arbitrary or capricious, an abuse of discretion or not in accordance with law. Administrative Procedure Act, 5 U.S.C. §706(2)(A) (1964 ed).

The Secretary cannot seriously argue that he does not have the burden of proof. Rule 73 of the Review Commission's Rules of Procedure clearly provides:

"In all proceedings commenced by the filing of a notice of contest, the burden of proof shall rest with the Secretary."  
[29 C.F.R. §2200.73].

In describing this burden, one reviewing court stated:

"When the Secretary fails to produce evidence on all necessary elements of a violation, the record will--as a practical

consequence--lack substantial evidence to support a commission finding in the Secretary's favor....

The burden of proof presumably also includes the burden of persuading the Commission, or its hearing examiner, by a preponderance of the evidence, but a reviewing court must uphold a Commission finding supported by substantial evidence, and the Commission's view on the preponderance of evidence is otherwise final." National Realty and Construction Co. v. OSHRC, 489 F.2d 1257, 1263 and n.24 (D.C. Cir. 1973), (footnote number omitted and emphasis added).<sup>6</sup>

Both Brennan v. OSHRC and Hendrix, 511 F.2d 1139, 1143 (9th Cir. 1975) and Horne P&H Co. v. OSHRC, 528 F.2d 564, 570-71 (5th Cir. 1976) hold (1) the Commission's procedural requirement placing upon the Secretary the burden of proving all elements of a violation is the proper exercise of the Commission's authority under the Act and (2) the burden is equally applicable to both serious and non-serious violations.

The elements which are required to be proved in this case include: (a) the existence of a condition violating a cited OSHA Standard and (b) exposure of the employer's own employees to the risk noted.

As the ALJ noted in this case:

<sup>6</sup> In National Realty and Construction, the court held that in the absence of a showing by the Secretary of the particular steps employers should have taken to avoid citation for permitting employee to stand as a passenger on running board of front-end loader at a construction site, and the feasibility and likely utility of those measures, a finding of violation was not supported by substantial evidence. With respect to the alleged Hi-Lo violation herein, the Secretary has not even shown that the rider was employed by anybody aside from his failure to show that (1) Northeast Marine Terminal employed him, (2) permitted him to ride as alleged or (3) could have taken steps to prevent the action [A 78-79].

Absent proof that the violations found exposed employees of this respondent to the hazards contemplated by the standards violated, a citation against the respondent cannot be sustained. The principal was expressed by Chairman Moran in Secretary v. Otis Elevator No. 688 (October 8, 1974) as follows:

This Commission has consistently held that just because a condition on the worksite fails to comply with the specifications of a Standard, a violation of the Act has not been established. There must be evidence that employees of respondent have been exposed to the hazard as a result of non-compliance. Secretary v. Hawkins Construction Co., OSHARC Docket No. 949 (May 20, 1974); Secretary v. City Wide Tuckpointing Service, OSAHRC Docket No. 247 (May 24, 1973). [A 153].

As to the element of employee exposure, the Secretary's own Field Manual for its Compliance Officers instructs them as follows:

"3. Employee Exposure

A hazardous condition which apparently violates an OSHA standard or the general duty clause shall be cited as a violation only when an employee is exposed, or potentially exposed, to the hazard. Actual or potential exposure must have occurred within the 6 months immediately preceding the issuance of a citation in order to serve as a basis for the citation.

a. Actual exposure

(1) Actual employee exposure is established if the [compliance officer] witnesses actual exposure of an employee or employees to the

hazardous condition during the inspection....

(1) Potential employee exposure exists where it is evident that employees could be exposed to a work-place hazard. To establish potential employee exposure, the [compliance officer] must carefully document the facts which demonstrate the potential exposure. Such facts may include actual past employee exposure which could be repeated, as well as work patterns or circumstances or anticipated work requirements which indicate the possibility of exposure in the present or future....

c. Procedures.

(1) In documenting exposure which he has not actually observed, the [compliance officer] shall make every effort to obtain the name, address, telephone numbers, job assignment and employer of exposed employees and other witnesses. The [compliance officer] shall reduce to writing as soon as possible the substance of any conversation with an exposed employee or a witness where the employee or witness is willing. Where possible, photographs indicating the way in which past exposure occurred or the way in which the potential for exposure exists shall be taken."

Field Operations Manual, Ch. VIII, CCH Employment and Health Guide, §4360.1 (emphasis added).

Even this Compliance Officer admitted he was aware of the need to establish the identity of employees exposed. In the case of one serious violation where such identity had not been established by the closing conference, he simply did not feel he could issue the citation. The violation

involved:

"[a] jumbo high low supporting the frame and lifting the frame into the top of which was the 25 foot eye-beam [sic] with a man hanging on the South third of the beam without any protection afforded to him in the event he fell." [A 121].

But the same Compliance Officer refused to issue a citation because:

"[The] Area Director suggested that it isn't clear cut and explained the Terminal and Stevedoring concept. Also, there was no determination made as to who the man on the beam was or one on the top of the block house was and the Area Director advised that I get back to the area and cite them for a serious violation upon discovery of who the employee was and make a proper contact and to do so, and due to the fact that I was assigned to a fatality within a day or so within completing the writing of the report and during the review period, I was unable to get back to the Terminal to continue any further investigation." [A 121-122].

The exact same area and the same people involved in that serious violation resulted in a citation for a non-serious violation [A 124]. Obviously, the Secretary's Area Director knew full well that he had to establish the employer of those involved to support the citation. Yet the Secretary now contends that he need not prove this element to support the imposition of liability on Northeast Marine Terminal.

In the instant case, the Secretary failed to meet the initial burden of persuading the ALJ and the Review Com-

mission by a preponderance of the evidence and they rightly found the Respondent innocent under "any theory of liability." Both the Review Commission and the ALJ properly ruled that the evidence adduced simply did not meet the Secretary's burden.

The ALJ found as a fact that:

"[T]he evidence does not establish that any of respondent's employees were affected by the violations or exposed to the hazards contemplated by the standards." [A 154].

He therefore concluded that:

"The Respondent did not violate the standards set forth above. . ." [A 155].

The Review Commission agreed that:

"[The] complainant has failed to establish by the preponderance of the evidence that any employee of respondent was actually exposed to the alleged hazardous conditions or had access thereto." [A 160]. (footnote number omitted).

Frankly, there is just no evidence in this record that any Northeast Marine Terminal employee was exposed to the cited violations.

Nowhere in its 25-page brief does the Secretary point to a single line of testimony identifying even one employee of Respondent, Northeast Marine Terminal, who is alleged to be exposed to or had access to any of the three cited hazards at issue here. Nor is there any evidence that Northeast Marine Terminal created the hazards.

Indeed what is most bothersome is that the Compliance Officer and now the Secretary are willing to stretch the Compliance Officer's testimony to conceal the stark fact that the Compliance Officer could not honestly testify that Northeast Marine Terminal caused or was responsible for the three cited violations or that any Northeast Marine Terminal employee was exposed.

For as the record reveals, the Compliance Officer's observations only concerned the allegedly hazardous conditions and nothing supposedly said or done by Mr. Chiplock specifically dealt with or established employee identity or control by Northeast Marine Terminal.

With regard to the alleged Hi-Lo violation, the Compliance Officer testified that he observed a Hi-Lo machine with seating capacity for one person coming out of a shed and moving across the terminal with two people riding on it, one partially hanging over the machine [A 56-57]. However, he conceded on cross-examination that he did not know who owned the Hi-Lo; he did not know who employed the driver; and he did not even know whether the rider was in fact employed by anybody on the day in question [A 78-79]. Moreover, the Compliance Officer made no attempt by interrogation of the riders or Chiplock or examination of payroll records to determine who in fact employed these men, despite his

admission that Chiplock never told him these men were hired by Northeast Marine Terminal [A 79].

In testifying before the ALJ, the Compliance Officer again sought to pawn off surmise for hard evidence, blithely asserting that the owner of the shed from which the Hi-Lo emerged was "Northeast" [A 82]. But on cross-examination he admitted his ruse, stating that he did not look at the papers on file in Kings County to see who owned the shed, that the City of New York owned the entire premises and that he did not know who leased the entire premises from the City or whether the Northeast Marine Terminal even leased the shed in question [A 82-83].

With respect to the alleged violation of the OSHA Standard regarding clean and orderly places of employment, the Compliance Officer could not even testify that he saw anyone in the cluttered area at the time he observed the mess, and he did not determine or even attempt to determine whether employees who could possibly be exposed to the hazard worked for Northeast Marine Terminal [A 102].

Not surprisingly, with respect to the third and final violation at issue, the Compliance Officer was similarly unable to testify that any Northeast Marine Terminal employee was involved. He testified that he observed various machine parts that were previously cleaned dripping gasoline in the

garage area, but there is nothing in the record to identify the employees involved.

The only basis advanced for citing Northeast Marine Terminal for any of these violations was an alleged conversation with Chiplock wherein Chiplock complained that his acknowledged employer Northeast Stevedore had "too many" violations assessed against it. The Compliance Officer therefore agreed that some of the citations be "laid off" on Northeast Marine Terminal. According to the Compliance Officer he made the determination to cite Northeast Marine Terminal:

"during the closing conference when this was considered a Terminal operation being that no ship was working and the Terminal was working to repair equipment so as to become a Terminal violation and was laid there." [A 103]. (emphasis added).

Conveniently, the Compliance Officer's testimony avoided the classic rule that witnesses should testify to "what was said." The Compliance Officer avoided reporting dialogue. Instead he offered only these vague and conclusory statements of little probative value. Moreover, the conclusion that if no ship was working employees were engaged in a Terminal operation does not square with the Compliance Officer's earlier testimony that Northeast Stevedore not only worked ships but worked cargo, sheds and trucks as well [A 53].

Moreover, the Compliance Officer's other testimony revealed clearly that his testimony was unworthy of credit

by any standard. On many occasions he told inconsistent stories and was often found to contradict himself or reveal that his former testimony was essentially imprecise to the point of being misleading. When the Compliance Officer just did not know the answers to the questions he was asked he often tried to confuse the ALJ by testifying to whatever he imagined would support the Secretary's case.

At A 79 the Compliance Officer first stated that:

"According to Mr. Chiplock the Terminal  
[employed the Hi-Lo driver].

But when asked:

"Q. That was what Mr. Chiplock who told  
you?"

he replied:

"A. You mean specifically it was hired  
by the Terminal, he didn't say that." [A 79].

To support his citation, the Compliance Officer, in response to the question "who is the owner of that shed [at the foot of 39th Street]", first testified "Northeast" [A 82]. Later he admitted that despite his prior testimony, the City of New York owned the shed and he simply did not know "whether the terminal or the Stevedore or x leased that shed from the City" [A 83].

At A 100 the Compliance Officer claimed that there were "people" who may have been exposed to the alleged hazard on the escape route to a telephone room. By A 101 these

"people" had dwindled to one person whose employer was never identified.

At A 103 the Compliance Officer indicated there was no ship working at the time the inspection was made but at A 118 he admitted that the ship was in port at the South end of the complex. Indeed, the Compliance Officer admitted that there was also a construction operation with other employers and their employees at the site [A 117], but he did not "lay off" any of the citations on them or even inspect their operation.

It is hardly "irrational" for the ALJ and Review Commission to refuse to credit just about anything this Compliance Officer testified to. It would certainly be wrong for this Court to interfere with the decision on the basis of such patently untrustworthy evidence. The fact is that despite all the conclusory statements, despite the Compliance Officer's attempts to use vague, unsupported surmise to mask the absence of evidence on key facts, the Record here is quite bare of evidence on whose employees were exposed or who was responsible for the conditions cited and it is the Secretary who bears the burden of proof. For these reasons, the Court should certainly affirm the Review Commission's decision. Indeed, had the decision come out the other way, this Court would have been required to reverse the decision and vacate the citations.

Point II

THE SECRETARY'S ARGUMENTS  
ARE NOT WELL TAKEN

The Secretary argues that:

(1) all he need prove is that Northeast Marine Terminal created or controlled the violative condition [Secretary's Br. 14-15];

(2) Chiplock's out of court statements, to the Compliance Officer, though hearsay, are either admissible under the "principle of the law of administrative evidence that hearsay is freely admissible and can constitute substantial evidence to support findings. . ." or because they constitute an admission by Northeast Marine Terminal [Secretary's Br. 15-19 at 16-17];

(3) to put the Burden of proof on the Secretary will cost the taxpayers money [Secretary's Br. 19-21];

(4) the Review Commission has in other cases put the burden of proof on employers [Secretary's Br. 21-22]; and finally,

(5) Northeast Marine Terminal's then attorney of record admitted Chiplock's authority to represent Northeast Marine Terminal on April 4 by a letter indicating that he was its Safety Director in August.

The Secretary's arguments will not, however, bear

scrutiny because:

(1) Here as in other non-construction cases, the Secretary must prove employee exposure;

(2) Any supposed principle that hearsay is admissible in Administrative Proceedings does not apply here because the Review Commission rules require the application of the Federal Rules of Evidence and the statements were not admissions;

(3) Regardless of cost, the Regulations putting the burden of proof on the Secretary can only be changed by a rule making procedure under the Administrative Procedure Act;

(4) The cases cited by the Secretary to support the asserted shift of the burden of proof are clearly distinguishable and do not announce general rule changes; and

(5) The August letter not only does not prove authority at an earlier date, but does not even constitute admissible evidence.

A. The Secretary Must Prove Employee Exposure

Because he apparently concedes that he failed to prove that Northeast Marine Terminal employees were exposed to the cited hazards, the Secretary first argues that "the only issue remaining in this case is whether the Secretary proved a prima facie case of control over the hazardous conditions by the Northeast Marine Terminal Company" [Secretary's Br. 14].

This erroneous conclusion is apparently based on the equally erroneous assertion that:

"The [ALJ] found that the hazardous conditions were violations of the cited Standards and that employees on the worksite were exposed to the hazards." [Secretary's Br. 14].

To the contrary, the ALJ said:

"[The Compliance Officer]. . . testified to facts from which violations of the Standards charged against the respondent could be inferred. However, there is no probative evidence in the record showing the violations established exposed employees of Northeast Marine Terminal Co. to the hazards contemplated by the Standards. [A 151-152] (emphasis added).

In any event, since the complex is not a construction worksite, the general rule regarding the necessary elements to establishing a violation applies, viz, that an employer (even on a multi-employer worksite) is responsible for the violation only if there is convincing evidence that its employees have been exposed to or have access to the hazardous conditions, irrespective of who created the condition. Field Operations Manual, Chapter X, CCH Employment Safety and Health Guide, ¶4380.6; Central of Georgia Railroad Company, 5 BNA OSHC 1209, 1212 (OSHRC April 5, 1977); Secretary v. Otis Elevator Co., CCH 1974-1975 OSHD, ¶18,774 (OSHRC October 8, 1974); and that the Secretary has the burden of producing such evidence. Zwicker Electric Company, 5 BNA OSHC 1329 (OSHRC

April 21, 1977); Olin Construction Company v. OSAHRC, 525 F.2d 464 (2d Cir. 1975).

The Secretary's attempt to avoid his full burden is based on an unwarranted extension of the approach taken in the Brennan v. OSHRC and Underhill Construction Company, 513 F.2d 1032 (C.A. 2, 1975) and Anning-Johnson Co., CCH 1975-1976 OSHD ¶20,690 (OSHRC 1976). These cases create a narrow exception to the general rule regarding multi-employer sites carved out to deal with the construction industry which has the "highest rate of injury of any major category of employment." Brennan v. Underhill, supra, 513 F.2d at 1038. Moreover, the major problem with construction worksites is not that they are multi-employer worksites, but that they are constantly changing environments where a new structure or hazard is added as each part of the site worked on. In contrast, other multi-employer worksites are more permanent and it is therefore easier to determine whose employees are subjected to the hazard and for the employers to inspect to see that areas where their employees work are free from hazards. No case has been cited where this rule has been applied to non-construction employers.

B. The Hearsay Should Have Been Excluded But Does Not Satisfy the Secretary's Burden in Any Event.

But even under the Underhill exception, the Secretary still retains the burden of proving that Northeast Marine

Terminal created the hazard or had control over the areas in which the hazards were located. The Review Commission held that the Secretary failed to meet the burden of proving that "respondent created the non-compliant conditions or was responsible therefor" [A 160]. The Secretary now argues that this determination was "contrary to law, an abuse of discretion and arrived at in [sic] an irrational disregard of the record" [Secretary's Br. 15].

But the Review Commission did not "irrationally disregard" the record; it carefully considered the scant hearsay evidence presented and properly concluded that it was not adequate to sustain the citation [A 150-153]. And upon analysis of the evidence, this determination could hardly be considered an abuse of discretion.

Even the Secretary admits that the only basis for establishing Northeast Marine Terminal's responsibility was Chiplock's suggestion to "lay off" the violations onto Northeast Marine Terminal instead of Northeast Stevedoring during the closing conference. The only testimony to that effect was by the Compliance Officer, so it is clearly hearsay evidence and counsel for Northeast Marine Terminal frequently objected to the testimony regarding Chiplock's statements on various grounds, including hearsay [A 44, 47, 49, 51-52, 54, 55, 57, 103, 125, 133, 134]. In each instance the ALJ erroneously

overruled the objection and admitted the testimony [A 44, 45, 47, 49, 52, 57, 103, 133, 134].

Although the ALJ correctly found the hearsay lacking in probative weight in any event, he erred in even admitting the testimony at all.

OSHRC Rules of Procedure provide:

"Hearings before the Commission and its Judges shall be in accordance with §554 of Title 5 USC and insofar as practicable shall be governed by the rules of evidence applicable in the United States District Courts." [29 C.F.R. §2200.72]

And the Federal Rules of Evidence provide that:

"Hearsay is not admissible except as provided by these rules or other rules prescribed by the Supreme Court. . . ." [Rule 802 of the Federal Rules of Evidence].

Under the rules, hearsay is defined as "a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted" [R 801(c) of the Federal Rules of Evidence]. The Secretary, to his credit, just about admits that when the Compliance Officer testified as to what Chiplock allegedly said, that was hearsay [Secretary's Br. 15].

The Secretary, citing Richardson v. Perales, 402 US 389, (1971), Rocker v. Celebrezze, 358 F.2d 119 (2nd Cir. 1966), NLRB v. Intl. Union of Oper. Engrs., 413 F.2d 705 (9th Cir. 1969) and American Rubber Products Corp. v. NLRB, 214

F.2d 47 (7th Cir. 1954), argues, however, that the hearsay is "freely admissible in an administrative proceeding" and can therefore constitute substantial evidence to support findings. These cases stand for no such principle.

The administrative hearings involved in Richardson v. Perales and Rocker v. Celebrezze, were governed by the Social Security Act which specifically provided, contrary to the instant case, that

"[e]vidence may be received at any hearing before the Secretary even though inadmissible under the rules of evidence applicable to court proceedings." 42 USC §405(b) as quoted in Richardson v. Perales, 402 US at 400; 20 C.F.R. §404.928 as quoted in Rocker v. Celebrezze, 358 F.2d at 122 and n.9.

In contrast, Review Commission rules require adherence to the Federal Rules of Evidence in OSHA cases.

In American Rubber Products Corp. and Intl. Union of Operating Engineers, cases which involved administrative hearings also governed by the Federal Rules of Evidence<sup>7</sup> the hearsay evidence was held admissible by the Court only because, unlike here, nobody objected to its admission at the hearing, 214 F.2d at 52 and 413 F.2d at 707.

And, in any event, the medical reports admitted in Richardson v. Perales are specifically made admissible

<sup>7</sup>Unfair labor practice proceeding before the National Labor Relations Board are insofar as practicable to be conducted in accordance with the Federal Rules of Evidence. See 10(b) of the Labor Management Relations Act, 29 U.S.C. §160.

under Rule 803 of the Federal Rules of Evidence as statements for the purpose of medical diagnosis or treatment. Even more significant was the fact that the party objecting to the hearsay bore the burden of proof with respect to the claim which was opposed by the hearsay statement. In effect the hearsay was used as a shield in rebuttal, not as a sword to satisfy the burden of proof.

The Secretary next contends that the Compliance Officer's testimony is not hearsay, but an admission by Northeast Marine Terminal as a party opponent made by Chiplock at the time of the inspection.

It is true that under Rule 801(d)(2) admissions by a party opponent are admissible if:

"The Statement is offered against a party and is. . . (C) a statement by a person authorized by him to make a statement concerning the subject or (D) a statement by his agent or servant concerning a matter within the scope of his agency, made during the existence of the relationship."

The Record will be searched in vain for any testimony establishing an authorization by Northeast Marine Terminal to Chiplock to make any statement whatsoever. Nor is there a shred of evidence as to the scope of Chiplock's authority or agency if he in fact were an employee or agent of Northeast Marine Terminal.

The Secretary argues that Chiplock's authority to

bind Northeast Marine Terminal is proven by:

- (1) The "reasonable assumptions" made by the Compliance Officer based on what he said Chiplock "said" to him at the Closing conference about his [Chiplock's] representative status (but assumptions are not evidence);
- (2) the "fact" that the Compliance Officer's credibility had supposedly never "been impugned" (See pp. 25 to 27, supra);
- (3) the limited resources of the Secretary;
- (4) the failure of Northeast Marine Terminal to meet "its burden" of proving Chiplock was not its servant [but no citation of authority to support this novel rule of law has been offered]; and
- (5) a letter from Counsel for Northeast Terminal dated several months after the inspection identifying P. Kiplock as "its Safety Director" [Secretary's Br. 18, 23].

The Secretary concedes that the recitation by D Martino of what Chiplock told him may well be considered "hearsay under traditional tests unless Chiplock's representative status is established by other than his out-of-court statements." [Secretary's Br. 16]. His attempt to establish that status by the Compliance Officer's testimony falls far short of establishing that status.

In the first instance, it is axiomatic that the fact of agency must be proved by independent evidence before the alleged agent's declaration can be received as an admission of his alleged principal. As a result therefore the use of the alleged agent's hearsay assertions of agency are not sufficient standing alone to establish that agency. 4 Wigmore, Evidence §1078, p. 123; Seacost Electric Co. v. Franchi Brothers Construction Corp. 437 F.2d 1247 (1st Cir. 1971); Gumpert v. Bon Ami Company, 251 F.2d 735 (2d Cir. 1957); Rownell v. Tide Water Associated Oil Co., 121 F.2d 239 (1st Cir. 1941). As Wigmore states, this is "never disputed, except by those counsel who have to receive elementary training from the hands of the Supreme Court." 4 Wigmore, Evidence §1078, p. 123, n.5. Hence, absent independent proof of Kiplock's agency his statements are still hearsay as to Northeast Marine Terminal.

The Compliance Officer's familiarity with Chiplock from previous inspections was as Safety Director for Northeast Stevedore not Northeast Marine Terminal [A113-114] and he testified that he thought he was dealing with Chiplock, an employee of Northeast Stevedore until the closing conference [A133]. Consequently, any abatements and actions taken by Chiplock during the inspection were as a representative of Northeast Stevedore. There was no evidence that the conditions he supposedly "exercised authority to order corrected" were created or controlled by Northeast Marine Terminal as opposed to Northeast Stevedoring or some other employer. Nor does

the mere act of supplying the federal reporting numbers for Northeast Marine Terminal evidence that authority.

The credibility of the Compliance Officer was very much impugned and is very much in issue in this case. The record reveals that he was constantly evasive, failed to testify directly on many items, offered only conclusory evidence and when cross-examined as to the basis of his conclusions, often came up with exactly contradictory statements [pp. 25 to 27, supra]. It is hard to imagine a witness more impugned than this Compliance Officer.

In fact, the only thing that a reasonable man could have concluded from the record was that additional evidence was needed to satisfy the burden of proof. For example, despite the Secretary's protestation that Chiplock's agency was supported by his hearsay statements the fact is that nowhere in the record does the Compliance Officer testify whether he was in fact employed by Northeast Marine Terminal or that he asked Chiplock about his position or authority. To require Compliance Officers to take this simple step is hardly a drain on the Secretary's "limited resources".

C. The Cost of Complying with Regulations is Not Germane

The Secretary argues that although it should be allowed to base its entire case on admissions of employer representations, the burden of proving the principal-agent

relationship should rest on the employer because it would be unfair to drain the limited resources of the Secretary to have to resort "to elaborate discovery mechanisms calling potentially hostile witnesses to dispose of an issue which can have serious merit in only a small number of cases." [Secretary Br. 20 (emphasis added)].

Apparently, the Secretary does not perceive the fundamental unfairness of his position or the fact that he is depriving an employer of the presumption of innocence plus untold thousands of dollars spent to defend themselves against charges that never should have been made. Moreover, he has forgotten that under OSHA, he has the authority and responsibility to both inspect and investigate and that pursuant to that role, he can interrogate any number of witnesses and require the production of evidence, 29 U.S.C. §657(a)(2) and (b). He has also lost sight of that fact that OSHA "is designed not to punish but rather to achieve compliance with the standards and abatement of safety hazards." Anning-Johnson v. OSHRC, 516 F.2d 1081, 1088 (7th Cir. 1975).

The Secretary argues that he must rely on the statements made by employers and employees in order to provide swift and certain enforcement [Secretary's Br. 19]. In this case, however, the "statements" relied on were nothing more than a safety director's efforts to be cooperative with the compliance officer-- a factor which Mr. D. Martino clearly

indicated is considered grounds for penalty abatement [A 71].

The Review Commission rightly disapproved of this reliance especially since the Compliance Officer needed only to have retraced his steps to question workers regarding their employee status--a simple and equitable procedure required by his own field manual. Consequently, if this decision is reversed, it will be a signal to every employer to instruct their safety representatives to refrain from cooperation in the absence of legal advice since such actions could be misconstrued as admissions of liability where none in fact existed. And such action would be justified in light of the fundamental unfairness of imposing fines based on such sloppy procedure by government agents.

Moreover, if employers believe that liability and penalties are unfairly and improperly assessed, their only recourse will be to contest every violation to avoid and unwarranted escalation of fines to a punitive level for future "violations". Since the OSHA is based on a spirit of voluntary compliance, its effective administration and implementation would severely suffer as a result of the sanctioning of the unfair procedures which the Secretary here espouses.

D. The Secretary's Cases Announce No Shift in the Burden of Proof

The Secretary contends that the cases of A. J. McNulty and Co., Inc., CCH 1975-76 OSHD ¶20,600 (OSHRC April 8, 1976), Huber, Hunt, Nichols and Blount Brothers, CCH 1976-77 OSHD ¶20,837 (OSHRC June 28, 1976) and Stephenson Enterprises, Inc. CCH 1976-77 OSHD ¶21,120 (OSHRC September 22, 1976)

place the burden of proof on the employer and demonstrate "a glaring inconsistency" in the Commission's decision. These cases do not shift the burden to the employer, they only find that the Secretary met his burden where admitted or proven agents had made certain statements.

In Stephenson, the head mechanic and the plant manager were specifically identified as a management representative and admitted that employees of the Company used the defective equipment; CCH 1976-1977 at p. 25,429. Here the Compliance Officer never asked whose employees were exposed. In Huber Hunt, Nichols and Blount Brothers the Commission did not indicate the actual weight given the testimony of the representative but merely stated that the testimony was not inadmissible as hearsay because it was proved that the declarant was "respondent's designated walkaround representative." Here there is no proof that Northeast Marine Terminal designated Chiplock as its walkaround representative.

In McNulty the issue was also as here, whether the evidence demonstrated that employees involved in the alleged violation were the respondent's employees. The respondent's [McNulty] superintendent identified the employees in question as McNulty employees to two separate compliance officers after one officer testified he asked the respondent's superintendent "specifically if they were his employees and he said that they were." While the Commission admitted the evidence was "arguably hearsay", it pointed the following facts:

- (1) McNulty did not object at the hearing to the admission of the testimony nor raise it as an issue before the Judge or the full Commission [Northeast Marine Terminal repeatedly objected];
- (2) the value of the evidence was bolstered by corroboration of another witness [no one corroborated D. Martino's testimony];
- (3) the compliance officers had virtually identical recollections of the superintendent's declarations [D. Martino's recollection here varied];
- (4) the statements were made by an admitted employee acting within the scope of his employment [the scope of Chiplock's authority appears nowhere in the Record here].

The difference between all these cases and the instant case is patently obvious and fully justified the different results reached by the Commission. In this case, there was no specific identification of Chiplock as Northeast Terminal's employee. The Compliance Officer never ascertained Chiplock's authority to represent Northeast Marine Terminal; he never specifically asked him or anyone else the identity of the workers' employer; he even admitted that Chiplock did not tell him who hired the workers; he never determined how many other employers might occupy the worksite; he never ascertained which company owned, occupied, or controlled

the areas where the hazardous conditions existed; and he did not believe he was inspecting Northeast Marine Terminal while he was there. The Compliance Officer was content to rely on Chiplock's suggestion that violations should be "laid off" on Northeast Marine Terminal.

E. Former Counsel's August Letter Does Not Satisfy the Secretary's Burden of Proof

Finally, the Secretary argues that a letter dated four months after the inspection from Northeast Marine Terminal's then attorney which states "Respondent may call its safety director, P. Kiplock", establishes that Chiplock was authorized to make admissions on behalf of Northeast Marine Terminal.

Obviously, the letter does not state that Chiplock was safety director of Northeast Marine Terminal at the time he is alleged to have made the admission. Nor would the statement that Chiplock was "safety director" establish authority to make admissions on Northeast Marine Terminal's behalf. In any event, judicial admissions are found only where they are made with proven authority or in a formal document such as a pleading. Taylor v. Allis-Chalmers Mfg. Co., 320 F. Supp. 1381, 1385 (E.D. Pa. 1969) aff'd per curiam, 436 F.2d 416 (3rd Cir. 1970) cited approvingly in Hub Floral Corporation v. Royal Brass Corp., 454 F.2d 1226 (2d Cir. 1972); Vacarro v. Alcoa Steamship Co., 405 F.2d 1133 (2d Cir. 1968); Headman v. Berman Leasing, 352 F.Supp 213, 214 (Ed. Penn. 1972). Former counsel's letter was not made an exhibit to the Record

before the ALJ or the Review Commission, while the pleadings and exhibits were. Its inclusion in the Appendix here is obviously a clever afterthought by the Secretary, which does not raise this letter to a part of the record on appeal.

Point III

THE CITATIONS MUST BE VACATED  
IN ANY EVENT BECAUSE THEY  
WERE NOT ISSUED WITH "REASONABLE  
PROMPTNESS" WITHIN THE MEANING  
OF SECTION 9(a) OF THE OSHA

Because the citations were not issued with reasonable promptness as required by OSHA they should be vacated on that ground. Section 9(a) of OSHA provides:

"If, upon inspection or investigation, the Secretary or his authorized representative believes that an employer has violated a requirement of Section 5 of this Act, of any standard, rule or order promulgated pursuant to Section 6 of this Act, or of any regulations prescribed pursuant to this Act, he shall with reasonable promptness issue a citation to the employer. . ." (emphasis added)

In the instant case, the inspection was completed on April 4, 1974, the Compliance Officer completed his paper work on April 10, 1974, but the citation was not issued until May 14--over five weeks later. On the other hand, a citation was issued against Northeast Stevedore based on the same inspection on April 15, 1974--an entire month earlier. The time to contest the Northeast Stevedore citation expired fifteen working days later on May 6, 1974. The citation against Northeast Marine Terminal thus was not issued until Northeast Stevedore had waived its right to contest.

At the hearing, Counsel for Northeast Marine Terminal moved to vacate the citations on the ground that they were not issued with reasonable promptness, but the ALJ denied the motion because of what he felt was an "absence of evidence that the citation was issued more than three days after the complainant or his authorized agent had formed the belief that a violation had occurred. . ." [A 149] based on the Commission's decision in Chicago Bridge & Iron Company, 1 BNA OSHC 1485 (1974).

In the Chicago case, the Commission held (1) that the reasonable promptness requirement applied only to the ministerial tasks remaining after the Secretary decides that a violation has occurred and (2) the Secretary must perform those tasks within 72 hours absent exceptional circumstances

The Court of Appeals for the Seventh Circuit reversed the Commission and rightly found that basing the commencement of a time period on the mental decision to issue a citation could result in effectively obviating the protection the 72-hour rule supposedly afforded. 514 F.2d 1082, 1084 (7th Cir. 1975).

Following this decision, the Commission revised its position and now holds that a citation will only be vacated "when the employer is prejudiced or the citation is issued

following an unconscionable delay". Par Construction Company, No. 11092, 4 BNA OSHC 1779 (OSHRC October 15, 1976).

Nowhere in the statute or its legislative history is the requirement that the citation be issued with reasonableness promptness subject to a qualification that the employer demonstrate delay or that the delay must rise to the level of unconscionability. The proper standard is the reasonableness of the Secretary's actions.

Here the Secretary took over 30 days to issue the citation. There was no explanation offered for this gross delay. Absent such justification, it can hardly be said that the citation was issued with reasonable promptness.

In any event, such a lengthy delay seriously prejudiced the rights of Northeast Marine Terminal. Had the citations been issued within a reasonable time, Northeast Marine Terminal could have conducted its own investigation, perhaps finding tangible evidence showing that it simply was not responsible. The delay made that impossible. In addition, the issuance of a citation against Northeast Stevedoring over a month earlier added to Northeast Marine Terminal's difficulties. The failure to issue a citation against it at that time when another company which was inspected at the same time was cited could have easily been interpreted as an indication to Northeast Marine Terminal that no citation

would issue at all. Hence, the company was lulled into believing no investigation on their part was necessary since the Secretary apparently agreed Northeast Marine Terminal could not be cited.

CONCLUSION

For any or all of the foregoing reasons, the Review Commissions vacation of the three citations should be affirmed.

Respectfully submitted,

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## Affidavit of Service by Mail

In re:

Ray Marshall v Northeast Marine Terminal Company and  
Occupational Safety and Health Review Commission

State of New York  
County of New York, ss.:

..... Harry Minott .....

being duly sworn, deposes and says, that he is over 18 years of age.

That on JUN 24 1977, 197....., he served 2 copies of the  
within Brief.....

in the above-named matter on the following counsel by enclosing said  
two copies in a securely sealed postpaid wrapper addressed as follows:

Alfred J. Albert, Esq.  
Acting Solicitor of Labor  
U.S. Department of Labor  
Washington, D.C. 20210

Benjamin W. Mintz, Esq.  
Associate Solicitor for  
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Michael H. Levin, Esq.  
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Allen H. Feldman, Esq.  
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U.S. Department of Labor  
Washington, D.C. 20210

John A. Bryson, Attorney  
U.S. Department of Labor  
Washington, D.C. 20210

~~and depositing same in the official de-  
pository under the exclusive care and  
custody of the United States Post  
Office Department within the City of  
New York.~~

and depositing same at the Post Office  
located at Howard and Lafayette  
Streets, New York, N. Y. 10013.

Harry Minott

Sworn to before me this 24th  
day of June, 1977.....

Jack A. Messina  
JACK A. MESSINA  
Notary Public, State of New York  
No. 30-2673500  
Qualified in Nassau County  
Cert. Filed in New York County  
Commission Expires March 30, 1979

## Affidavit of Service by Mail

In re:

Ray Marshall v Northeast Marine Terminal Company and  
Occupational Safety and Health Review Commission

State of New York  
County of New York, ss.:

Harry Minott

being duly sworn, deposes and says, that he is over 18 years of age.  
That on JUN 24 1977, 197..., he served 2 copies of the  
within Brief  
in the above-named matter on the following counsel by enclosing said  
two copies in a securely sealed postpaid wrapper addressed as follows:

Allen H. Sachsel, Esq.  
Appellate Section, Civil Division  
Department of Justice  
Washington, D.C. 20530

~~and depositing same in the official depository under the exclusive care and custody of the United States Post Office Department within the City of New York.~~

and depositing same at the Post Office located at Howard and Lafayette Streets, New York, N. Y. 10013.

Harry Minott

Sworn to before me this 24th  
day of June, 1977

Jack A. Messina  
JACK A. MESSINA  
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